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Supreme Court of the United States

October Term, 1971.

No. 71-12.

JOHN ATTILO TATASCIORE,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIFICATION.

ANTHONY M. BEZICH,
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New Jersey,
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Camden, New Jersey 08101.
A. DONALD BIGLEY,
Prosecutor of Camden County.
CHARLES A. COHEN,
Assistant Prosecutor,
On the Brief.

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COUNTERSTATEMENT OF THE CASE.

The petitioner, John Attilo Tatasciore (whom we will hereinafter refer to as the defendant) was indicted for the crime of breaking and entering the dwelling house of Mrs. Dolores Tierno, in the Township of Pennsauken, County of Camden, and State of New Jersey, committed on January 13, 1968. He was later brought to trial in the Superior Court of New Jersey, Law Division, before a judge and a jury, and was found guilty, and subsequently, on March 23, 1970, was sentenced to imprisonment for the term of 364 days in the Camden County Jail, with credit to be given for some time he had already spent in jail for the offense.

The defendant appealed from the judgment of conviction to the Appellate Division of the Superior Court of New Jersey, and that court by unanimous decision on February 2, 1971, affirmed the conviction.

The decision of the Appellate Division having been by a unanimous court, the defendant did not have the right of appeal as of course to the Supreme Court of New Jersey. His right was by petition to the Supreme Court for certification, similar to a petition for a writ of certiorari. This right the defendant pursued, but the Supreme Court on May 4, 1971, denied certification. 58 N. J. 334.

The defendant now petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the Appellate Division, and tenders as the federal question involved a claim that constitutional rights were infringed by the manner in which he was identified as the culprit, including the absence of counsel on his behalf at the identification confrontation.

COUNTERSTATEMENT OF THE FACTS.

Mrs. Dolores Tierno and her husband and children live at 501 Homestead Avenue, in Pennsauken. On Saturday evening, January 13, 1968, between 6:20 and 6:30 P.M. after being out on an errand, Mrs. Tierno returned home in her car, one of her daughters, Linda, with her. Mrs. Tierno testified that as she approached the driveway leading to the carport she observed that it was dark, although she had left an outside light on, and when she pulled into the driveway the lights of the car filled the whole carport, and she saw "this figure" standing at the door which opened into the house from the carport. Mrs. Tierno further testified that the lights startled the man, and he looked up at her, and he quickly turned to his left, and went out the other open end of the carport, and he turned his head completely toward the car, and the car lights were right on him then; the man stopped at the end of the driveway, at the back of the house, and stood there maybe two or three seconds to decide whether to go right or left, and he went to the left. Mrs. Tierno then lost sight of him, and she had Linda run to the nearby home of Sergeant Yost, of the Pennsauken police. Mrs. Tierno gave the Sergeant a description of the man, and he relayed the description to the police department for broadcast. Sergeant Yost testified that Mrs. Tierno described the intruder as white, male, short in height, and with black hair, and, as to his attire, that he wore a dark jacket, about waist length, and bluish green type of pants.

Sergeant Yost called for the police, and he remained at the house, and when Detective Young and police arrived "they" brought into the house two young boys they had come upon in the neighborhood, and Sergeant Yost himself brought into the house a "fellow" whose car had failed outside the house as it pulled up to the intersecting street, but Mrs. Tierno told the officers the persons they brought to the house could not be the offender.

While Sergeant Yost and the other police were still at the Tierno home a telephone call was received, and one of the officers was delegated to drive Mrs. Tierno to the parking area of a shopping center, variously estimated to be 5, 6, 7, 8, or 9 blocks away; that "they" had a suspect there. When Mrs. Tierno arrived there, Police Officer Strippoli was there with a man, and she was asked to identify the man as the man who had entered her house. Her testimony at the trial with respect to the confrontation then proceeded as follows:

> "A. When I got there, we pulled up onto the driveway and Officer Strippoli was there with a man that he had asked if could be identified as the man that entered my house. Of course, I looked at him and said, yes, I thought it was the same man. I asked that he be turned around because I did see the back of him, and the clothing was identical and his size was identical and I was certain that was the man.
>
> Q. You asked that he be turned around?
>
> A. So I could see the back of him, because he stopped deciding which way to return and that's when I really could be certain.
>
> Q. Do you see the man in court today that you identified?
>
> A. Yes.
>
> Q. Would you point him out, please?
>
> A. Sitting right there.
>
> THE COURT: I wonder if the Defendant could stand?
>
> THE WITNESS: Yes.
>
> THE COURT: Is that the person that you saw in your driveway and breezeway?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Is there any doubt in your mind?
>
> THE WITNESS: No."

In view of the limited grounds advanced by the defendant for a writ of certiorari there is no need to present other

facts in the case, including circumstantial evidence, namely, shoe prints in the snow fitting the size and shape of the shoes then worn by the defendant, for it was snowing or had then recently been snowing the evening of the crime.

Little more than a half hour elapsed between the time Mrs. Tierno returned home and discovered the intruder at the door and the time she identified him on the parking lot of the shopping center where he was being detained by Officer Strippoli.

ARGUMENT.

I.

The pretrial identification did not violate due process of law.

(a)

In his petition for a writ of certiorari the defendant makes two points. In Point I he contends that the pretrial identification confrontation was so unfair and suggestive as to amount to a denial of due process of law, but in the development of the theme little more is said than that the defendant should have been placed in a lineup.

First it should be remarked that at the trial the defendant entered no objection to the evidence touching the confrontation at the parking lot of the shopping center and the identification there made by Mrs. Tierno of the intruder she saw at her home, nor did the defendant at the trial move for a preliminary hearing by the court, out of the presence of the jury, to determine preliminarily whether the supposed illegal pretrail confrontation tainted the imminent in-court identification. The defendant therefore now raises, or on the review sought by him could raise, questions not presented at the trial.

In *State v. Macon*, 57 N. J. 325, decided January 25, 1971, the Supreme Court of New Jersey dealt with appellate review of questions not raised at the trial. The opinion is a masterly exposition of the subject, and we ask the court to read it in full, the more so that there the defendant also claimed violation of federal constitutional rights, and in the following passage from the opinion the court considered the views of the federal courts with respect to the need for timely objection in order to preserve the right of appellate review:

> "The Federal Supreme Court has always recognized that a State has a substantial interest in requiring litigants to object timely so long as a fair opportunity is afforded to that end. Henry v. Mississippi, 379 U. S. 443, 452, 85 S. Ct. 564, 13 L. Ed. 2d 408, 415 (1965); Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965); see O'Connor v. Ohio, 385 U. S. 92, 87 S. Ct. 252, 17 L. Ed. 2d 189 (1966). Hence even though the federal courts will permit a State defendant to raise constitutional issues for the first time in a federal proceeding, provided he did not deliberately bypass State procedures, Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963), yet Henry made it plain that the Federal Supreme Court did not wish 'even remotely [to] imply that the State must forego insistence on its procedural requirements.' 379 U. S. at 452, 85 S. Ct. at 570, 13 L. Ed. 2d at 415. Nothing in Chapman intimates a departure from Henry. In short, although Chapman is controlling in a State court review of a timely claim of error, it does not curtail the authority of the State court to decide whether or how to deal with a claim of error which was not timely. We have since Chapman continued to apply our approach to belated assertions of constitutional errors. State v. DiRienzo, 53 N. J. 360, 384 (1969); State v. Broxton, 49 N. J. 373, 388 (1967). For State cases elsewhere which since Chapman have also required a timely objection at the trial, see People v. Armstrong,

268 Cal. App. 2d 324, 74 Cal. Rptr. 37, 38 (1968); Robbins v. State, 242 N. E. 2d 925 (Ind. Sup. Ct. 1969); Thompson v. State, 6 Md. App. 50, 250 A. 2d 304, 307 (Ct. App. 1969); State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181, 184 (Sup. Ct. 1970). Indeed, as to federal trials, some federal cases since Chapman appear to deal as we do with a belated claim of error. See People of Territory of Guam v. Cruz, 415 F. 2d 336, 338 (9 Cir. 1969); Marshall v. United States, 409 F. 2d 925 (9 Cir. 1969); United States v. Baratta, 397 F. 2d 215, 227 (2 Cir. 1968), cert. denied, 393 U. S. 939, 89 S. Ct. 293, 21 L. Ed. 2d 276 (1968); Mims v. United States, 375 F. 2d 135 (5 Cir. 1967)."

The foregoing analysis of the decisions of the courts in the federal system makes it unnecessary to pursue the subject further, but we add *People v. Cruz,* 415 F. 2d 336 (Ct. of App. 9th Cir. 1969), where the court held that a waiver of objection to evidence of identification will be found where timely objection was not made at the trial.

(b)

If timely objection had been interposed at the trial to the testimony regarding identification of the defendant as the perpetrator of the crime, his contention would still lack merit.

Although the practice of displaying suspects singly to persons for purpose of identification has been condemned, and the use of a lineup as a police technique has been condemned, it does not necessarily follow in all cases that the absence of such latter procedure *per se* renders the former unfair or unreliable. The totality of the circumstances must be considered. See *Stovall v. Denno,* 388 U. S. 293, 302 (1967); *Simmons v. United States,* 390 U. S. 377 (1968); *Biggers v. Tennessee,* 390 U. S. 404, 408 (1968); *State v. Sinclair,* 49 N. J. 525, 545 (1967).

Not much more than a half hour elapsed between the time Mrs. Tierno discovered the intruder at her door and the time she viewed him on the shopping center parking lot, a distance of about nine blocks at the most, and so hardly a mile, from her home.

It is completely inaccurate for the defendant to say (page 5 of the petition for certiorari) that the identification was "prearranged in detail by the police," for here the fact was only that Officer Strippoli, having heard the description of the intruder broadcast, and seeing a man who appeared to fit the description, detained him then and there on or near the street, and called into headquarters, and Mrs. Tierno was driven to the shopping center. There, she made a careful view of the man, front and back, and of his attire, and identified the man as the culprit. Nothing to justify the characterization of the confrontation as a meeting prearranged in detail by the police, inevitably suggesting a plot against the man, can be found in the case.

At page 5 of the defendant's petition, the following is said: "There was no emergency requiring such singular confrontation. A police lineup could easily have been arranged with people of like descriptions included along with the suspect." This statement betrays lack of acquaintance with the construction of a lineup. Besides, the actual facts must be considered: a township police force; a Saturday night in winter; snowing. How easy is it to gather a number of men of like description? Where are they to be recruited? How are they to be recruited? May they be impressed against their will? The questions supply their own answers.

And it is also said at page 5 of the defendant's petition that the "additional delay caused to Mr. Tatasciore while waiting for a properly conducted lineup to be arranged would be more than offset by the added due process of law that would be afforded to him." If the suspect was not the guilty one, he would be the last person in the world to be gratified by this show of police deference to due process, and the knowledge that the day or two he spent in custody

were used by the police to arrange a properly conducted lineup would hardly requite him for his suffering or embarrassment. His would be the loudest voice in the chorus of protest.

If Mrs. Tierno had not been permitted to look upon the man while Officer Strippoli had him in hand at the shopping center parking lot, the township police force could not have ceased their effort to find the malefactor, their time would have remained futilely engaged, and they, for similar supposed constitutional reasons, would not have been able to ask Mrs. Tierno to look upon any other men they might detain until "a properly conducted lineup" had been arranged, and she would not have been able immediately to eliminate from suspicion persons picked up by the police as she had eliminated the three young men whom the police had brought to her house.

No violation of the defendant's right of due process occurred in this case.

II.

The absence of counsel from the identification confrontation did not infringe upon the defendant's constitutional rights.

At the time Mrs. Tierno viewed the defendant at the shopping center parking area he was not under arrest, and no criminal prosecution had yet been inaugurated against him. He had then simply been detained by the police officer because he seemed to the officer to match the description that had been broadcast by the police. The defendant was at the moment only the subject of an investigatory detention, and only a half hour or so had passed since Mrs. Tierno had discovered the offender at her door.

The present case closely resembles *Russell v. United States*, 408 F. 2d 1280 (D. C. Ct. of App. 1969), cert. den. 395 U. S. 928, also a case of a person held in investigatory

detention, although the time interval between crime and identification probably was some minutes less than here. The court there held that *United States v. Wade,* 388 U. S. 218 (1967), did not embrace an identification made under circumstances such as appeared in the case. The judge who wrote a concurring opinion in the *Russell* case added this acute observation: "I think this case, like many others which are brought here, should have been disposed of summarily as utterly frivolous."

In *State v. Satterfield,* 103 N. J. Super. 291, 294 (App. Div. 1968), the court said:

> "We here determine that the Wade line of cases (requiring the presence of counsel for an accused subjected to a police 'lineup' or comparable identification procedure) was not applicable in these circumstances for the reason that this confrontation took place in the course of an on-the-spot general, street investigation of a complaint of suspicious activity. At the time there was no specific complaint to the police of possession of narcotics by defendant, merely of suspicious behavior by him. We are satisfied that this type of routine police investigative activity was not intended to be comprehended within the presence-of-counsel specifications laid down by the Court in the Wade line of cases."

In *State v. Thomas,* 107 N. J. Super. 128, 134 (App. Div. 1969), the identification confrontation took place no more then ninety minutes after the crime was committed. The court stated that the essential problem was whether on the facts of the case a pre-indictment identification, within a short period after the complained of incident, and immediately after the defendant was taken into custody, is such a critical stage of the proceedings as to require the presence of counsel, or whether the factual pattern is more akin to the on-the-scene identification where there is no such prescribed requirement. The court held that the identifica-

tion of the defendant there without the presence of counsel was not a denial of his constitutional rights.

In *State v. Smith*, 182 N. W. 2d 409 (Supreme Court of Iowa, 1970), the court held that absence of counsel at identification of defendant made by victim of a robbery within and hour and a half of the robbery did not violate the defendant's right to counsel. The court evidently reviewed the decisions across the country before reaching its conclusion, and quoted this passage from the opinion of the now Chief Justice in the case of *Bates v. United States*, 132 U. S. App. D. C. 36, 405 F. 2d 1104 (1968), where two assaulted women viewed and identified an arrested suspect within approximately thirty minutes after the offense was committed, and he had no counsel and none was present:

> "There is no prohibition against a viewing of a suspect alone in what is called a 'one-man showup' when this occurs near the time of the alleged criminal act; such a course does not tend to bring about misidentification but rather tends under some circumstance to insure accuracy. The rationale underlying this is in some respects not unlike that which the law relies on to make an exception to the hearsay rule, allowing spontaneous utterances a standing which they would not be given if uttered at a later point in time. An early identification is not error * * *. To the contrary, the police action in returning the suspect to the vicinity of the crime for immediate identification in circumstances such as these fosters the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh."

CONCLUSION.

For the reasons above given, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated, July 14, 1971.